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No. 79-51

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY DI LAPI, ET AL., PETITIONERS

v.

JOHN S. IRVING, GENERAL COUNSEL,
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 1

Constitutional provisions involved 2

Statement 2

Argument 6

Conclusion 10

CITATIONS

Cases:

Barber v. *Page*, 390 U.S. 719 9

California v. *Green*, 399 U.S. 149 9

United States v. *Benfield*, 593 F. 2d 815 9

United States v. *Farries*, 459 F. 2d 1057, cert. denied, 410 U.S. 912 9

United States v. *MacDonald*, 435 U.S. 850 8

United States v. *Nixon*, 418 U.S. 683 8

Constitution, statutes and regulation:

United States Constitution, Sixth Amendment 7, 8, 9

Freedom of Information Act, 5 U.S.C. 552 5

28 U.S.C. 2106 8

29 C.F.R. 101.18 2

Page

Miscellaneous:

NLRB Casehandling Manual (Part Two) Representation Proceedings, Section 11020, 11028.4 2

Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 125 (1974) 9

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-21a) and of the district court (Pet. App. 22a-31a) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1979 (Pet. 3), and the petition for a writ of certiorari was filed on July 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether modifications of the district court's order requiring the disclosure of subpoenaed union authorization cards were beyond the authority of the court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions are set forth at Pet. App. 32a.

STATEMENT

1. On April 5, 1978, Local 20408, United Warehouse, Industrial and Affiliate Trades Employees Union ("Local 20408") filed a representation petition with the Board's Regional Office in Newark, New Jersey, seeking an election among certain employees of G.S. Supply Associates, Inc. and G.S. Temporary Service, Inc., employed at a Jersey City, New Jersey, terminal of Interstate Dress Carriers, Inc. ("IDC"). The petition was thereafter amended to include employees of IDC also employed at the Jersey City terminal, as well as employees of the three employers working at certain New York terminals (Pet. App. 2a). Local 102, International Ladies' Garment Workers' Union ("Local 102") was allowed to intervene in the proceeding.[1]

A hearing on Local 20408's petition was conducted before a Board hearing officer in October, November and December 1978. During this proceeding, to show employee interest to support its petition, Local 20408 submitted union authorization cards signed by employees in the unit it sought to represent.[2]

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[1]On August 31, 1978, following an investigation of charges filed by Local 20408, the Board's Regional Office issued a consolidated unfair labor practice complaint against the employers and Local 102 alleging unlawful threats, interrogations and promises of benefits in connection with the employees' efforts to associate with Local 20408.

[2]It is Board practice to require that a representation petition be supported by at least 30 percent of the employees in the unit. 29 C.F.R. 101.18. The adequacy of a union's showing of interest, usually evidenced by employee authorization cards, is determined administratively by the Board. *NLRB Casehandling Manual (Part Two) Representation Proceedings*, Sections 11020, 11028.4.

2. Meanwhile, on September 6, 1978, petitioners and several other defendants, including Local 102, were indicted in the United States District Court for the Eastern District of New York on charges of conspiring to obstruct the representation proceeding before the Board, in violation of 18 U.S.C. 1505 and 371. The indictment charges, *inter alia*, that the defendants "by threats and by threatening communications, did endeavor to influence, obstruct and impede the due and proper administration of the law under which such proceeding was being had by offering and paying Matthew Eason [President of Local 20408] a sum of money and by offering membership in Local 102 ILGWU to persons designated by Matthew Eason in order to induce him to withdraw said [representation] petitions [filed with the Board], and by threatening Matthew Eason with physical harm, economic injury and the loss of employment of employees of [Interstate Dress Carriers, Inc., G.S. Supply Associates, Inc., and G.S. Temporary Service, Inc.], unless Matthew Eason withdrew said petitions." (Pet. App. 2a; A. 3).[3]

On December 29, 1978, IDC served subpoenas upon two NLRB officials directing them to produce certain documents, including "[a]ll authorization cards or applications for membership in Local 20408 * * * signed by employees" in the unit involved (Pet. App. 2a-3a; A. 49).

The Board and the United States moved to quash both subpoenas on the grounds that the material sought was

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[3]"A." refers to the appendix to the briefs in the court of appeals.

privileged[4] and that this privilege outweighed IDC's unspecified needs for the material (Pet. App. 3a). On January 8, 1979, the district court issued an order denying the motions to quash the subpoenas and ordering that the authorization cards be turned over to IDC (*ibid.*). While acknowledging that the cards are privileged, the court concluded that they must nonetheless be disclosed because "I cannot say that under no circumstances is the material subpoenaed irrelevant to the crimes charged in this indictment" (Pet. App. 26a).

The Board took an immediate appeal from this decision to the United States Court of Appeals for the Second Circuit, filing a Notice of Appeal and a Motion for Stay Pending Appeal and/or Petition for a Writ of Mandamus. The Second Circuit dismissed the appeal and denied the petition for a writ of mandamus (Pet. App. 3a). John S. Irving, as General Counsel of the Board and legal custodian of the subpoenaed authorization cards, continued to refuse to disclose them without some procedural safeguards against exposing the card signers to retaliation from the defendants (A. 229-231, 242).[5] IDC

[4]Employee authorization cards are exempt from discovery during Board proceedings and from disclosure under the Freedom of Information Act, 5 U.S.C. 552. The Board's long-standing policy of maintaining the confidentiality of authorization cards and the court's exempting of the cards from FOIA disclosure are based on the fear of reprisals and the chilling effect that would result from disclosure to employers or rival unions. See cases cited at Pet. App. 12a-14a nn. 5-7.

[5]The record contains specific information indicating why retaliation against the card signers from the defendants might be expected; it also shows that threats and acts of serious physical violence against Local 20408 supporters had already occurred (A. 98, 253-254; sealed transcript, pages 30, 33; sealed affidavit).

and the other defendants moved for dismissal of the indictment. The district court, deferring a ruling on that motion,[6] ordered Irving to show cause why he should not be held in contempt, and after briefing and argument, held him in both criminal and civil contempt for his failure to obey the court's disclosure order (Pet. App. 3a).[7]

On appeal of the contempt orders, the Second Circuit overturned the criminal contempt finding and affirmed the civil contempt finding, but modified the disclosure requirement (Pet. App. 1a-21a). Balancing the interests of the defendants in the criminal proceeding against those of the Board, the court held that the authorization cards could not be kept completely confidential (Pet. App. 16a). "However, in view of the important and valid public interest in maintaining the confidentiality of authorization cards, and under the specific circumstances of this case,"[8] the court of appeals concluded that "a more limited order of disclosure than that issued by the district court is warranted" (*ibid.*). Accordingly, the district court's disclosure order was modified as follows (Pet. App. 16a-17a):

> The subpoenaed authorization cards and membership applications are to be disclosed to the attorneys for the defendants, but they are not to be disclosed to the defendants themselves. The records are to be

[6]The motion was denied on April 16, 1979; the denial was not appealed.

[7]Irving was fined $10,000 plus $1,000 for each day he failed to comply with the disclosure order (Pet. App. 3a). The orders were stayed pending appeal (*ibid.*).

[8]The court noted that threats of violence against the card signers had been substantiated in a sealed affidavit, submitted by the United States (Pet. App. 14 n.7). See also note 5, *supra*.

produced in bulk rather than individually to ensure that knowledge of the identities of the employees who signed the cards can be confined to counsel. This compromise will enable the defendants' attorneys to determine whether any of the cards were forged or are relevant to the defense. At the same time, the confidentiality of the employees will be adequately protected. Should specific forgeries be found or should an explicit showing of need be made, then the district court in its discretion may order full disclosure of the specific cards in question. If after examining the cards counsel for defendants wish to interview particular employees, they may do so outside the presence of the defendants and in the presence of the court or a magistrate so that any interviewed employee will be protected from intimidating or coercive questioning.

Judge Mansfield dissented only from the requirement that the employees be interviewed in the presence of the district court or a magistrate, rather than by defendants' counsel privately (Pet. App. 19a-21a).

3. On May 8, 1979, the General Counsel turned over the authorization cards to IDC's counsel, who accepted them on behalf of all counsel, and they have been in petitioners' counsel's possession ever since. Moreover, since the decision of the court of appeals, the district court has frequently reminded the parties that the restrictions on disclosure that have been imposed are subject to modification in light of further developments (Tr. at 14, hearing of May 7, 1979; Tr. at 22, hearing of May 7, 1979; Tr. at 12, hearing of June 11, 1979). So far as we know, no application has yet been made to interview any particular card signer.

ARGUMENT

1. Petitioners' reliance (Pet. 7-9) on the principle that a criminal proceeding must be dismissed when the government refuses to produce evidence in its possession that is material to the defense is misplaced. As the court of appeals properly found (Pet. App. 6a-7a), the authorization cards were withheld by the General Counsel of the National Labor Relations Board, who is not a "party" to the criminal proceeding and is not subject to control by the Justice Department, which is prosecuting the criminal case.[9] The only question before the court of appeals was whether the contempt citations against the General Counsel for failing to produce the cards should be sustained, and that court sustained the civil contempt citation although modifying the terms of disclosure. The further question whether the indictment should be dismissed was not an issue in the contempt proceeding, as the court of appeals noted (Pet. App. 4a n.1); it would be reached only if the General Counsel were to persist in his refusal to produce the cards under the protective conditions added by the court of appeals. This is now an academic issue, for the General Counsel has turned the cards over to petitioners' counsel pursuant to the terms of the court of appeals' disclosure order.

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[9]The United States Attorney filed a separate brief in the court of appeals, supporting the General Counsel's contention that the district court had abused its discretion in requiring disclosure of the authorization cards, but differing as to the appropriate limitations on disclosure if the court of appeals concluded that some limited disclosure was justified (Br. 2-3, 21, 36-39). The court of appeals adopted a position agreeable to the Board and coinciding in substance with the United States Attorney's proposal, and the cards were released to petitioners' counsel on that basis. Accordingly, there is, in this Court, no difference in position between the Department of Justice and the General Counsel of the National Labor Relations Board. The Solicitor General has therefore concluded that it is appropriate to follow the usual practice of representing the General Counsel in this Court.

2. Petitioners' Sixth Amendment contentions (Pet. 10-12) are not ripe for this Court's consideration. The disclosure procedure formulated by the court of appeals—under which the identity of the card signers is revealed to petitioners' counsel, but not to petitioners themselves, and any interviews with the card signers are conducted outside the presence of petitioners—is only an initial step in the pre-trial process. "Should specific forgeries be found or should an explicit showing of need be made, then the district court in its discretion may order *full disclosure* of the specific cards in question" (Pet. App. 16a; emphasis added).[10] Accordingly, whether the procedures ultimately utilized operate to deprive petitioners of the right to confront witnesses or the effective assistance of counsel can only be determined after the pre-trial process and the trial itself have been concluded. Cf. *United States* v. *MacDonald*, 435 U.S. 850 (1978) (defendant may not, before trial, appeal trial court order denying his motion to dismiss an indictment because of an alleged violation of

[10]Contrary to petitioners' contention (Pet. 9-10), the court of appeals' modification of the district court's disclosure order does not ignore the teaching of *United States* v. *Nixon*, 418 U.S. 683, 702 (1974), that "great deference * * * [should] be accorded the district court's decision as to the scope of a subpoena or disclosure order." The court of appeals acknowledged the great deference to be accorded the district court's decision but concluded that "the district court did not give due recognition to the importance of maintaining the confidentiality of the authorization cards" (Pet. App. 16a n.9). Nothing in *Nixon* precludes the court of appeals from modifying a district court's disclosure order in these circumstances, in accordance with the authority expressly conferred on the courts of appeals by 28 U.S.C. 2106 to "affirm, modify, vacate, set aside or reverse" judgments on review.

his Sixth Amendment right to a speedy trial, because the question of prejudice to the conduct of the defense and the events at the trial are intertwined).[11]

[11]In any event, the limitations on petitioners' involvement in the discovery process violate neither the right to counsel nor the confrontation clause of the Sixth Amendment. The court of appeals properly considered the need for witness security in ordering the provisional discovery restrictions. See *United States* v. *Farries*, 459 F. 2d 1057, 1062 (3d Cir. 1972), cert. denied, 410 U.S. 912 (1973) (no violation of right to counsel or confrontation clause in district court's restrictions on defendants' participation in selection and interviewing of witnesses). Indeed, unless the interviews resulted in testimony admitted into evidence at trial, no right of confrontation would arise at all. *California* v. *Green*, 399 U.S. 149, 156-159 (1970); *Barber* v. *Page*, 390 U.S. 719, 725 (1968). See Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 125 & n. 261 (1974).

United States v. *Benfield*, 593 F. 2d 815 (8th Cir. 1979) (Pet. 10-11) is not to the contrary. That case involved the use at trial of testimony of the chief prosecution witness taken at a deposition from which the defendant was excluded. The court held that use of the deposition violated the confrontation clause, which "contemplates the active participation of the accused at all stages of the trial, including the face-to-face meeting with the witness at trial or, at the minimum, in a deposition * * *" (593 F. 2d at 821). The "confrontation" which petitioners seek here is not at trial or other adversary proceeding, but at a stage that will not yield directly admissible evidence subject to a right of confrontation. And, as indicated *supra*, should petitioners later establish a need to confront the card signers, there is no reason to assume that they would be denied that opportunity. Finally, as recognized by the court in *Benfield* (593 F. 2d at 821):

> What curtailment or diminishment [of the right of confrontation] might be constitutionally permissible depends on the factual context of each case, including the defendant's conduct.

See also *United States* v. *Farries*, *supra*, 459 F. 2d at 1062.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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